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*Supreme Court of the United States.*

GUSTAVUS LEACH ET AL.,
*Plaintiffs in Error,*

*vs.*

CHARLES R. BURR,
*Executor, and*
SAMUEL H. LUCAS,
*Defendants in Error.*

Cal. Oct. Term, 1902,
No. 145.
No. 18,238.

# BRIEF FOR PLAINTIFFS IN ERROR.

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*Supreme Court of the United States.*

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### Statement of the Case.

This case arose in and was originally tried before a jury in the Supreme Court of the District of Columbia in Special Term for Orphans' Court business, thence carried by appeal to the Court of Appeals of the District of Columbia, and now comes here on writ of error.

Ezra W. Leach, white, died in the District of Columbia December 21, 1896, a bachelor, leaving as his only heirs at law the children and grandchildren of his deceased uncle and his deceased aunt, the plaintiffs in error.

Decedent's age was seventy-three (73) years, the duration of his last illness was eight (8) days, and the proximate cause of his death was "bronchial pneumonia" in acute form.

Decedent had personal and real property in the District of Columbia, but the value of the personalty was inconsiderable.

Being of charitable disposition, he one day supplied a small colored boy, whom he had not theretofore known, and of whose parentage he was equally ignorant, with food. Subsequently, ascertaining that the boy's parents were unable to provide for him properly, and as he was living alone, he offered the boy a home if he would work for him in managing his greenhouses. This boy was Samuel H. Lucas, the defendant in error. Leach and Lucas thereafter lived together in the former's house until the death of Leach.

On the 30th day of December, 1896, a paper-writing was filed in the Supreme Court of the District of Columbia, holding a Special Term for Orphans' Court business, in cause numbered 7,571, purporting to be the will of said decedent, which is set out in the record (p. 20), executed about two hours before decedent's death. But on the same day, immediately before executing said will, decedent signed, sealed, acknowledged and delivered a deed, granting *in praesenti* to the same Samuel H. Lucas the same real estate referred to in the alleged will. This deed was prepared by Rev. Hugh T. Stevenson, pastor of the Anacostia Baptist Church, (who was also a witness to the alleged will) and acknowledged and delivered by the decedent in the presence of two attesting witnesses before Andrew M. Green, a duly qualified Notary Public, who stated that he

would complete the jurat and affix his seal when he returned to his office.

To remedy any possible defects in the deed, said Stevenson suggested to Green that a will might also be drawn, as a supplement thereto. Green then prepared the alleged will which is in issue in this proceeding. The deed has been left unrecorded and has come into possession of the defendant in error, Burr, (Rec., pp. 21-24.)

On the 5th day of July, 1899, the proponents of the will filed a petition in the Orphans' Court of said District praying its admission to probate as to the realty, as they were permitted to do by Section 8 of the Act of June 8, 1898, (now section 141 of the Code), enlarging the jurisdiction of said Orphans' Court. A caveat was filed on the 30th day of August, 1899, on behalf of some of the heirs at law (Rec., p. 2.) An answer to this caveat (Rec., p. 3,) was filed on the 10th day of October, 1899, and three issues (Rec., p. 4,) were framed on the 3rd day of November, 1899, presenting questions of capacity, duress, and fraud respectively.

In pursuance of Section 6 of the above-recited Act, (now section 140 of the Code), the Orphans' Court passed an order (Rec. p. 7,) on the 26th day of January, 1900, directing publication of said issues and of the notice of trial, so as to reach non-resident heirs of decedent who did not sign the caveat. The affidavit showing the character of publication had, under said order, appears (Rec., p. 9.)

On the 5th day of March, 1900, a jury was sworn to try said issues, and by an order of Court (Rec. p. 10) the caveators were made plaintiffs upon the record and the caveatees were made defendants, and those published against were not made parties at all. No

proof of the execution of the will was offered at this trial. (See proviso to Section 4 of above Act, now Section 135 of the Code.)

After evidence adduced by plaintiffs, set out in the bill of exceptions (Rec., p. 14-25,) the Court, upon motion of the defendants, at the conclusion of of plaintiffs' testimony in chief, directed the jury to answer the first issue affirmatively and the second and third issues negatively; and such a verdict was accordingly found and entered (Rec., p. 11,) and judgment entered thereon (Rec. p. 12), and the will ordered admitted to probate and record (p. 13.) Exceptions to such ruling being noted, a bill of exceptions was signed and sealed by the presiding Justice, and an appeal prosecuted to the Court of Appeals of said District, which, however, affirmed the action of the trial Court (28 W. L. R., 782; also Rec., pp. 28-37.) From the decision of the Court of Appeals the present writ of error was allowed and prosecuted.

## Assignment of Errors.

*First.* The Orphans' Court of the District of Columbia erred in assuming jurisdiction to admit to probate the paper-writing offered as a last will and testament of the decedent, and its decree is a nullity because the procedure required by Section 4 of the Act of June 8, 1898, was not followed. The Court had not authority or jurisdiction to make the decree.

*Second.* The publication, without which having been strictly made the Court could not acquire jurisdiction of the absent parties, was not made according to law, nor as required by the order of the Court,

and therefore the Court had not jurisdiction of the necessary parties, nor had they a day in Court.

*Third.* The trial court erred in taking the case from the jury and directing their verdict, and the appellate court erred in sustaining the action of the said court below.

It was error, because——

1st. There was evidence tending to show want of testamentary capacity in the alleged testator;

2nd. There was no "formal proof," in the language of the statute, of the "proper execution" of the alleged will (v. Sec. 4). The evidence of subscribing witnesses was not adduced to show its execution according to the forms of law, or that the alleged testator saw or might have seen such witness sign ;

3rd. The evidence tended to show that it was not the intention of decedent to devise his real estate to Lucas, as stated;

4th. And because the evidence tended to show that the decedent had before the signing of the paper in question wholly parted with his seisen and possession of all his real estate, and there was then nothing on which the alleged will could be operative.

## Points.

### I.

*The court had not jurisdiction to proceed to trial.*

Prior to the Act of 1898, the Probate Court of the District of Columbia had no power or jurisdiction in respect to last wills or testaments, except to pass

upon their factum and determine that their form and attestation were sufficient under the provisions of the law.

All power it now has besides, apart from that relative to matters of guardianship and to administration bonds given by Act of February 20, 1846, is derived from, and strictly governed and limited by the Act of Congress approved June 8, 1898.

The case at bar is the first raising question of the force, proper construction and limitation of that act. Its provisions are sufficiently set forth on pages 29, 30 and [illegible] of the printed record, thus requiring no repetition in *extenso*.

The grant of jurisdiction there given "to hear and determine all questions relating to the execution and to the validity of any and all wills devising any real estate within the District of Columbia," etc., "subject, nevertheless, to the provisions * * * contained" in the act, was an entirely new grant of power, accompanied with specific and minute statement of how the power should be exercised—therefore mandatory and limited.

In carrying the law into effect, each step must be taken by the court in strict conformity to the statute, or the court transcends its jurisdictional bounds, and its acts are void.

Until each and every of the steps prescribed shall have been taken in such conformity with the terms of the statute, the court has no jurisdictional power to admit a will to probate and record.

The statute is *mandatory* in respect to the provisions laid down.

> "Where legislation points out specifically how an act is to be done * * * it must be

> strictly pursued. Where a statute in granting a new power prescribes how it shall be exercised, it can lawfully be exercised in no other way. The grant is strictly construed—the mode must be strictly pursued."
>
> Sutherland on Statutory Construction, § 454.

Now, Section 6 of the Act (v. Rec., p. 30,) requires that when the specified parties in interest have not been brought into court by a specified personal service, the court shall assign a day for trial and cause service to be made on such parties by publication of "copy of the issues and notification of trial" in a specified manner and period.

Accordingly, in this case (v. Rec., p. 7), the court, on the 26th of January, 1900, passed its order setting the issues down for trial on February 26th, 1900, and that such order and the "issues framed shall be published twice a week for four weeks."

Under this, proof was subsequently made (Rec., p. 9,) that publication was made on Friday, January 26, Tuesday, January 30, Friday, February 2, Tuesday, February 6, Friday, February 9, Tuesday, February 13, Friday, February 16, and Tuesday, February 20. And thereupon, without further order, setting for trial and publication, the court proceeded for trial on March 5, 1900, (Rec., p. 10).

We claim that the court, in this regard, did not conform to the procedure laid down by the statute, and so did not acquire jurisdiction to try.

(a) The law requires service of copy of the issues and notification of time and place of trial to be actually made "at least ten days prior to the time of trial." Necessarily, this means the day of trial set down in the order.

The publication provided for is in place of such personal service. The entire period of publication necessarily, therefore, must be complete "at least ten days prior to the time of trial" named in the order as published, and this is entirely compatible with the court's appointment of a subsequent day, only, that must be after it shall have previously acquired jurisdiction by a completed period of service publication.

(b) Again, the order was to publish "twice a week for four weeks," and apart from the requirement in respect to ten days after completed publication prior to the day set for trial, it is insisted that this means twice in each week as designating in universal common parlance that series of days called the week, "numbered or named (v. Century Dic., ad verb.), in succession Sunday (or first day, etc.), Monday, Tuesday, Wednesday, Thursday, Friday, Saturday." "2. The six working days of the week; the week minus Sunday." (v. also 4 Pet., 349-361; 4 Dana, (Ky.), 126, Thurston v. Masterson; 12 Cal., 100, Jordon v. Giblin; 23 How., Pr. R. (N. Y.), 516, Richardson v. Bates.)

All the authorities of decided cases go to show that jurisdiction cannot be maintained without the strictest and fullest compliance with the requirements of the statute. (v. Settlemier v. Sullivan, 97 U. S., 444; Hernandez v. Creditors, 57 Cal., 333; Estate of Koch, 19 N. Y. Civ. Pr., 165; 139 U. S., 137-145.)

There were, then, but three weeks in which the publication was made "twice a week." Publication once a week in two other weeks cannot cure the disregard of the statute and of the order. More nearly

had it been responsive to the law had the publication been on the Friday and Saturday of the first week.

(c) The court failed also of jurisdiction when it ignored the mandate of the Act (end of Sec. 4) "in no case shall any will or testament be admitted to probate or record save upon formal proof of its proper execution."

Words could not be framed more clear, effective or conclusive, yet the court, having assumed the prerogatives of the jury and directed their verdict, by sheer momentum proceeded (Rec., p. 13,) to adjudge, order and decree the alleged will "admitted to probate and record," taking no "formal proof of its execution."

Consent could not cure this omission. Due execution of the will is a vital, affirmative allegation, and the Act says no will or testament, even though not caveated, shall be admitted to probate without proof of the formal execution, that is, e. g. of the signing and declaring in the presence of the number of witnesses required by the statute, and that such witnesses, at the testator's request, attested the execution in his presence and in the presence of each other. (v. Trust Co. v. Heiberger, 30 W. L. R., 309.)

Can it be for a moment thought that the failure of a caveator to sustain his contention of insanity or undue influence obviates the need of these proofs to make the will of real estate operate to carry title?

II.

*It was error in the case at bar for the court to take the facts from the jury and direct their verdict.*

The manifest intent of the law is that the issues

framed shall be passed upon by a jury. Possibly we may not say the statute made them to be judges of law as well as of fact. But it is worthy of consideration that the act (sec. 6) requires that all persons interested shall be sui juris, and before the court, and all consent in writing before the court may assume to try and determine the issues without the jury; and yet in directing a verdict the judge in fact supplants the jury and subverts the law.

But apart from this, it surely cannot be said that there was no scintilla of evidence before the jury tending to prove any of the issues in favor of the caveators.

The facts in evidence on which we rely in support of this proposition, both as to the testator's incapacity and the undue influence to which he was liable and presumably subjected, appear in the bill of exceptions. (Rec. pp. 15-24.)

Briefly they may be grouped as follows:

The decedent was a man in extreme old age—long given to an eccentric and isolated life—the child of a deranged mother—on his death bed—in articulo mortis—in the *last hour* of acute bronchial pneumonia, attended by rheumatism, inguinal hernia, cardiac hypertrophy, and senile debility, which medical experts testified would tend to impair the mind and render it incapable of intelligently acting on a question of making a valid will or disposition of property. In a moment like this, off-hand, he is invited and led to sign a paper which for no cause ignored every tie of blood and relationship—which disinherited every one to whom the ripe, matured policy of the law and harmonious judgment of all mankind in all civilized ages regard as natural and

necessary subjects of affection, care and provision, and allow rights of inheritance, and feebly signing his name, not in his customary way, but by initials, the pastor of his church secures from him a paper, giving all to the colored boy in decedent's employ, with the understanding that the latter will convey certain real estate to his church—a disposition of his property apparently then first thought of, and one which, had he before contemplated it, he might have made long before his mortal illness came upon him, and certainly would have done so had such a thing entered his mind.

And yet, most singularly, the appellate court of the District of Columbia, in reviewing the action of the trial judge in taking the case from the jury, passed over in silence and ignored the issue of mental capacity *vel non*. The opinion of the court deals with the question whether there was any evidence to sustain the issue of undue influence only.

Before passing to the citation of some decisions calculated to illustrate this point, and in anticipation of an objection which the defense may possibly raise, we desire to say in respect to the proof of the cause of decedent's death, as shown in Record at page 19.

The certificate of decedent's death, admitted in evidence was sufficient in law to establish *prima facie the cause of death*, so as to preclude the necessity of establishing this by other independent evidence, in the presentation of caveators' evidence in chief.

> "The rule rejecting secondary evidence is subject to some exceptions; grounded either on public convenience, or on the nature of the

facts to be proved. Thus, the contents of any record of a judicial court, and of entries in any other public books or registers may be proved by an examined copy. This exception extends to all records and entries of a public nature, in books required by law to be kept; and is admitted because of the inconvenience to the public which the removal of such documents might occasion, especially if they were wanted in two places at the same time; and also because of the public character of the facts they contain, and the consequent facility of detection of any fraud or error in the copy."

1 Greenleaf on Evidence, § 91.

"The joint resolution of April 24, 1880, made the ordinances of the Board of Health the law of the District of Columbia"

D. C. vs. Gas Light Co., 3 Mackey, 343.

"The record kept by a person employed in the Signal Service of the United States, whose public duty it is to record truly the facts therein stated, is *competent evidence of such facts.*"

Evanston vs. Gunn, 99 U. S., 660.

Section 4 of the Regulations of the Board of Health (legalized by the Act of April 24, 1880, 3 Mackey, 343,) provides:

"Fourth. That whenever any person shall die within the District of Columbia it shall be the duty of the physician attending such person during his or her last illness to furnish certificate, duly signed, setting forth *the cause*, date and place *of death*."

Richardson's Supp. to R. S. U. S., Vol. 1, 2nd ed. 187-41891, p. 310.

And in support of our general proposition that the court erred in directing what verdict the jury should return, we cite decisions as follows:

> "In an action to contest the validity of a will on the ground of want of testamentary capacity and undue influence, an instruction which lays down the rule without qualification that, in determining whether the writing produced was the will of the testator, the jury have nothing whatever to do with the propriety or impropriety of the bequests mentioned in said writing, or as to whether said bequests were just or unjust, or as to whether such bequests should or should not have been made" is erroneous, since in such a case all the surrounding circumstances including the bequest itself, are proper and material to the determination of the issue.
>
> McCommon v. McCommon, Sup. Ct. Ill., June, 1892, 31 N. E. 491.

> "The fact is not disputed that, being advanced in years, he was laboring under the infirmities, both physical and mental, usually incident to old age, but as to whether he still retained that degree of mental capacity necessary to render him capable of making a valid will, the witnesses are greatly at variance. The question presented is purely one of fact and it was therefore, preeminently a matter for the jury to determine, and their verdict should not be disturbed unless we are able to say that it is clearly and manifestly against the weight of the evidence."
>
> McCommon v. McCommon (1894) 151 Ill., 428, 436.

> "In order to justify a trial court in directing a verdict, the evidence *and all proper inferences*

*from it*, must make so plain a case that all reasonable men would be driven to one and the same conclusion thereon."

Olmstead v. Webb, 5 App. C., 38.

"When in the trial of an issue involving the testamentary capacity of a testator, the testimony of the caveators, if true, would justify a verdict in their favor, it is proper for the trial court to refuse to direct a verdict on that issue for the caveatees."

Hardy v. Wise, 5 App. C., 108.

"When there is evidence *tending* to establish the issues on the plaintiff's part, it is error to take the case from the jury."

U. S. v. Chidester, (1891) 140 U. S., 49.

"When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not the determination of the matter is for the jury. It is only where the facts are such that *all* reasonable men must draw the *same* conclusion from them the question of negligence is ever considered as one of law, for the Court.

R. R. Co. v. Ives, (1891,) 144 U. S. 408,417.

"Where, in an action against a common carrier to recover damages for injuries to a passenger, there is *uncertainty* as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this, whether the uncertainty arises from a conflict in the testimony, or because the facts being undisputed, fair minded men will honestly draw different conclusions from them."

R. R. Co. v. Powers, (1893,) 149 U. S., 43.

10624



"A case should not be withdrawn from the jury unless the conclusion follows as matter of law that no recovery can be had upon *any* view which can be properly taken of the facts the evidence tends to establish."

Gardner v. R. R. Co. (1893) 150 U. S., 349.

"Where the court has misdirected the jury, *and the chances are equal*, that the verdict resulted from the error of the judge, a new trial will be granted."

3 Graham & Waterman of New Trials, 872.

And here let it not be overlooked that this decedent, an old man, eccentric in character, in the weakness of a mortal illness, calculated to greatly disturb if not paralyze his memory of kindred and of those dear to him by ties of blood, only two hours before his dissolution, with no opportunity to reflect upon or even recognize anything beyond that suggested to him by those in his immediate presence, is suddenly called to place his name to a paper, the effect of which is to disinherit all his lawful heirs and transfer all his estate to a lad in his employ, having no claims upon him but for his wages.

This very disherison of his heirs is in itself strong evidence of a state of mind incapable of making a valid will.

The citations of authority made in the opinion of the court in Delafield vs. Parish (25 N. Y. Rep. 9 &c.) are very pertinent on this point.

Quoting from the Marquis of Winchester Case (6 R., 23 a) the court adopts this, "by law it is not sufficient that the testator be of memory when he makes his will to answer particular and usual questions; but he ought to have a disposing memory,

so that he is able to make a disposition of his lands with understanding and reason." p. 23.

And quoting from the decision in Marsh vs. Tyrrell (2 Flagg, 122), the court approves these words:

> "It is a great but not uncommon error to suppose that, because a person can understand a question put to him and give a rational answer to such question, he is of perfect sound mind and capable of making a will. The competency of the mind must be judged of by the nature of the act to be done—from a consideration of all the circumstances of the case."

Quoting from Erskine, J., in Harwood v. Baker:

> "In order to constitute a sound disposing mind a testator must not only be able * * * but must also have capacity to comprehend the nature of the claims of others whom by his will he is excluding from all participation,—whether at that time he was capable of recollecting who those relations were,—of understanding their respective claims upon his regard and bounty, and of deliberately forming an intelligent purpose of excluding them from any share of his property."

Again, (p. 25) the language of the Chief Justice in 2 Southard, R. 454, is quoted: "A disposing mind and memory is a mind and memory which has the capacity of recollecting, discerning and feeling the relations, connections, and obligations of family and blood."

And on p. 26 the court approves the words of Chancellor Walworth in Clarke v. Fisher, 1 Paige, 171, as to the capacity of a person to make a will.

16625



> "He must be of sound and discerning mind and memory so as to be capable of making a testamentary disposition of his property with sense and judgment in reference to the situation of such property, and to the relative claims of different persons who are or might be the objects of his bounty."

And very wisely said the N. Y. Court of Appeals in the Delafield-Parish Case (p. 35.):

> "It is not the duty of the court to strain after probate * * * The heirs of a deceased person can rest securely upon the statutes of descents and distributions and that the rights thus secured to them can only be divested by those claiming under a will by showing that the will was executed with the formalities required by law, and by a testator possessing a *sound and disposing mind and memory*."

See also Insurance Co. v. Doster, 106 U. S., 30; Randall v. R. R. Co., 109 U. S., 478; Humiston v. Wood, 124 U. S., 12.

In the light of the foregoing citation of authorities, it is submitted that the caveators did adduce evidence entitling them to go to the jury, and that it was reversible error for the trial court to direct their verdict.

The plaintiffs in error present and submit for the consideration of this court two further propositions:

1st. A last will and testament is an instrument in writing, executed with due formalities by a legally competent person, possessed of a sound and dispos-

ing mind and memory, to declare his intention in respect to the disposition of his property after his death.

The evidence conclusively shows that the paper in this case propounded for probate does not express the intention of the testator, but was a suddenly suggested makeshift for getting the property to a religious organization, despite the prohibition of law.

2d. At the time this paper was signed the signer had already made conveyance of all his property by deed signed, sealed, acknowledged and delivered.

There could, therefore be no valid operative will, nothing to devise, no intention of devise.

For the further presentation of the argument, and fuller reference to the authorities on these as well as the preceding points the consideration of the court is respectfully called to the appendix herewith filed.

On all which the plaintiffs in error pray the court to reverse the judgment of the court below and remand the cause with directions to vacate the probate of the alleged will, and grant a new trial under such instructions as this court shall deem appropriate, and that their costs in this behalf sustained be awarded against the proponent of said alleged will and his codefendants in error.

Respectfully submitted,

WILLIAM A. MELOY,

*Attorney and Counsel for Plaintiffs in Error.*

# APPENDIX.

## Errors.

1. The Orphans' Court of the District of Columbia erred in assuming jurisdiction to admit to probate the paper-writing offered as the last will and testament of decedent.

2. The trial Court erred in directing a verdict; and the Court of Appeals of the District of Columbia erred in affirming said ruling.

## Points.

1. The Orphans' Court had not jurisdiction to admit to probate and record the alleged will of decedent:

(*a*) Because the plenary jurisdiction conferred by the Act of June 8, 1898, section 2 (now section 117 of the Code) is "to hear and determine *all* questions relating to the *validity* of any and all wills devising any real estate within the District of Columbia"; and a will incapable of operation cannot be said to have "*validity*."

(*b*) Because there is a limitation upon the power to devise, that is the *res* must be devisable, and decedent must have devisable interest in the *res*.

(*c*) Because a will cannot be said to have "validity" which secretly attempts to evade. (Section 457 of the Revised Statutes of the United States relating to the District of Columbia; re enacted by section 1635 of the Code for the District of Columbia.)

(*d*) Because the secret trust referred to, and subsequently carried out, indicates that the paper-writing offered does not contain *all* of decedent's will. (27 Henry VIII, Cap. 10 A. D. 1535).

(*e*) Because there was no proof of the execution of the alleged will.

(*f*) Because there was no jurisdiction to try the issues for want of due statutory publication.

(*g*) Because under section 2 of the Act of June 8, 1898 (now section 117 of the Code) a will can only be said to have "validity" and to be entitled to probate, when there is a concurrence of four conditions: first, the *res* must be devisable; second, decedent must have devisable interest in the *res* at the time of the execution; third, the devise must be voluntary and ambulatory, and fourth, the testator must have testamentary capacity.

(*h*) Because, when the pastor of a church is an attesting witness to a devise to his church (even though the devise be secret), it is void under Stat. 25, George II, Ch. 6, Sec, 1, although he is a competent witness; perpetuated by section 1 of the Code.

2. The trial court erred in holding the evidence adduced by plaintiff in error insufficient to entitle them to go to the jury, and in directing a verdict.

(*a*) Because the medical testimony tended to show incapacity;

(*b*) Because the total disherison of the heirs, without naming them, tended to show incapacity. (27 Henry VIII, Cap. 10, A. D. 1535);

(*c*) Because the confidential relations between devisor and devisee cast the burden of proof upon the latter to sustain the alleged will;

(*d*) Because the act of signing a will, *after* signing a deed, (both professedly covering the same property) *itself* indicates want of testamentary capacity.

**Argument.**

(1*a*) The Act of Congress (upon which the proceeding herein is based) was approved June 8, 1898, and entitled "An Act conferring on the Supreme Court of the District of Columbia jurisdiction to take proof of the execution of wills affecting real estate, and for other purposes." Section 2 thereof (now section 117 of the Code) provides:

> "That in addition to the jurisdiction conferred in the preceding section of this act, plenary jurisdiction is hereby given to the said Court holding the said special term to hear and determine all questions relating to the execution and to the validity of any and all wills devising any real estate within the District of Columbia, and of any and all wills and testaments properly presented for probate therein, and to admit the same to probate and record in said special term; and neither the execution nor the validity of any such will or testament so admitted to probate and record shall be impeached or examined collaterally, but the same shall be in all respects and as to all persons res judicata, subject, nevertheless to the provisions hereinafter contained."

The last clause of section 6 (now section 140 of the Code) also provides:

> "In all cases in which such issues shall be tried the verdict of the jury and judgment of the Court thereupon shall, subject to proceeding in error and to such revision as the common law

> provides, be res judicata as to all persons, nor shall the validity of any such judgment be impeached or examined collaterally."

The conclusion therefrom seems to be that a will affecting real estate in the District of Columbia, besides being duly executed by a competent person, must be "valid" in order to entitle it to probate and record. If, therefore, for any reason it is not "valid," probate should be denied. One of the reasons that might render a will not "valid" is, that it is incapable of operation upon property; because the decedent never owned the property referred to in the will, or because the decedent parted with the property named in the will by a conveyance prior thereto *inter vivos* taking effect in *praesenti;* or because, after the execution of the will he altered the seisin thereof by a conveyance *inter vivos* taking effect in *praesenti*, and thereby in effect revoking the will.

The case at bar is an illustration of a will being not "valid," and therefore not entitled to probate, because decedent parted by deed *in praesenti* with the title to the same property covered by the will, if he had any mental capacity for the act at all. The Act referred to should be read and construed in the light of the decision of this court in the subjoined case, because the aim of the Act was remedially to cure the absence of jurisdiction therein pointed out. It supplied a power not theretofore existing:

> "The Supreme Court of the District of Columbia, sitting as an orphans' court, upon an application for the probate of a will of real estate, is without jurisdiction to determine upon its sufficiency to pass the real estate devised thereby." (Campbell v. Porter, 24 W. L. R., 294; 162 U. S., 478.)

16728



> "The *validity* of a will of real estate is to be determined by the laws and by the courts of the jurisdiction in which such real estate is situated, and not by any other law or any other tribunal." (Readman v. Ferguson, 13 App. C., 60.)

That the Congress did not intend that "invalid" instruments should be probated is further illustrated by section 15 of the Act of March 3, 1901 (Public No. 171) substantially reproduced by the amendment of section 290 of the Code, approved June 30, 1902, which is as follows:

> "And if any will be hereafter adjudged *invalid* in any action begun after distribution of the estate, or any part thereof, lawfully made by the executor or executrix, in good faith and without knowledge on his or her part of the invalidity of such will, and without notice that such action was intended, the distributee or distributees of the property, and their personal representatives, and not such executor or executrix shall be answerable for the property, or its value, to the person or persons thereto entitled."

(1*b*) There is a limitation upon the power to devise; that is, the *res* must be devisable, and decedent must have a devisable interest in the *res*. A will drawn in contravention of these principles is not "valid" within the meaning of the Act in question.

Section 1623 of Code: "What may be devised. All lands, tenements, and hereditaments, and personal estate which might pass by deed or gift, or which would, in case of the proprietor's dying intestate, descend to or devolve on his or her heirs or other representatives, shall be subject to be disposed of, transferred, and passed by his or her

last will, testament, or codicil under the following restrictions:

Section 1625. "Who capable of making will." No will, testament, or codicil shall be good and effectual for any purpose whatever unless the person making the same be, if a male, of the full age of twenty one years, and if a female of the full age of eighteen years, and be at the time of executing or acknowledging it, as hereinafter directed, of sound and disposing mind, and capable of executing a valid deed or contract."

"The *power* to dispose of property by will is neither a natural nor a constitutional right, but depends wholly upon statute, and may be conferred, taken away or limited, or regulated in whole or in part by the legislature. (Brettun v. Fox, 100 Mass., 234.)

The *power* of testamentary disposition extends to all interests in real and personal estate, which at the decease of the testator, would, if not so disposed of, devolve to his general, real or personal representatives. (1 Jarman on Wills, 5th Ed. Big.) p. 46.

"The will only operated upon such real estate as the testator possessed at the time of making it at common law and under the earlier English Statutes," (Redfield on Wills, p, 333, § 26.)

"No paper can be deemed testamentary and entitled to probate as a will, unless the benefit it confers is postponed to the death of the party who confers it. (Schouler on Wills 2nd Ed., § 272.

"All estates which are transmissible, either by operation of law, or by the act of the owner, are held devisable. (Redfield on Wills, p. 388, § 16.)

16729



"This brings on the consideration of the 2nd question: which is whether such right of entry be devisable; and we are of opinion that it is not devisable." (Goodright v. Forrester (1807), 8 East Rep. 551, 567.)

"A right to land under the proclamation of 1763, before warrant obtained, was a devisable interest." (Gist v. Robinet (1813), 3 Biff, Ky., 2.)

"To give effect to a devise, the testator must not only be actually seized of the land devised at the time of making his will, *but must continue seized to the time of his death*, A conveyance, therefore, by the testator of the land devised is so far a revocation of his will." (Minuse v. Cox, 1821, 5 Johnson's Ch. Rep., N, Y., 441, 450.)

"According to the established law of New York, nothing passed under the ulterior devise over to John Eden and Hannah Johnson: Medcef Eden on the death of his brother, Joseph Eden, became seized of an estate in fee-simple absolute." (Waring v. Jackson, 1828; 1 Pet., 570.)

"*Semble*, that the reversion in fee of B. was devisable, notwithstanding the discontinuance. *Sed quaere.*" (Doe v. Finch, 1832; 1 Neville & M. Rep., 130.)

"V's testamentary disposition of her whole estate in favor of C did not include the estate devised to her by C. It was the mere expectancy of a benefit to be derived from the will of C, not the subject of a testament." (Glenn v. Belt, 1835; 7 Gill, 363.)

This limitation of power is well expressed in the Statute 1 Victoria, Cap. 26, which though not in force in this District, (being enacted A. D. 1837) yet

recapitulates the older British law on the subject, which is in force here. (5 Peters 367; 14 Peters 145; 5 Howard 81; 14 Howard 415; 117 U. S. 665; 174 U. S. 229, 240; Section 1 of Code for the District of Columbia.

Section 3 thereof provides:

> "And be it further enacted, that it shall be lawful for every person to devise, bequeath, or dispose of, by his will executed in manner hereinafter required, all real estate and all personal estate which he shall be entitled to, either at law or in equity, *at the time of his death*, and which if not so devised, bequeathed, or disposed of would devolve upon the heir at law, or customary heir of him, or, if he became entitled by descent, of his ancestor, or upon his executor or administrator; and that the *power* hereby given shall extend to all real estate * * *

Section 23 also directs:

> "And be it further enacted, that no conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate *as the Testator shall have power to dispose of* by will *at the time of his death.*" (A. D. 1837) 1 Victoria, Cap. 26, Sec. 23.

> "Held, that the clause in question, in the events which happened, did not operate upon those negroes; that there was an intestacy as to them." Hardic v. Cotton (1804). 1 Iredells Eq. (N. C.,) 61, 64.

> "An instrument, limited by a condition as to its operation, cannot be admitted to probate as

16730



a will after failure of the contingency, on the happening of which it was to have taken effect." Todd's Will, 2 Watts & S. (Pa), 145.

"This deed was not a testamentary paper, and the order of the Orphans' court directing it to be recorded as such, was null and void." Robey v. Hamon, 6 Gill, 346 (1845.)

"A legatee or devisee who is a child or descendent of a testator, and who dies, leaving children surviving him, before the testator, can not by his will dispose of a legacy or devise given him by the will of the testator." Pate v. Pate, (1866) 40 Miss., 750.

"E had no interest in the share bequeathed to her which she could dispose of by will, until after the death of her mother; and that the will of E. prematurely made, could not defeat the gift over to the grand daughters." Estate of Hall, (1866) 26 Md., 107.

"The testator wrote a codicil with his own hand which concluded as follows: 'I give my wife the option of adding this codicil to my will, or not as she may think proper or necessary. Held, that the validity of this paper was conditional on the assent of the wife and that as she elected not to avail herself of its provisions, it ought not to be included in the probate." (In the goods of John Smith, 1869; 1 Law Rep. Probate, Divorce and Matrimonial, England, p. 717.)

"An agreement of two saving bank depositors that the survivor shall have the other's deposit, each retaining the absolute title and control of his deposit during life, is a testamentary disposition of property not made according to the Statute of Wills, and is invalid." (Towle v. Wood, 60 N, H., 434.)

"The will did not operate on joint and several notes made by the testator, between the date of the will and his death." (Waterman v. Alden, 1892; 143 U. S., 196.)

"The general presumption that a person intends to die testate of all his property, and the fact that the heirs of the testator never questioned the right of the testator to take the property in controversy, notwithstanding the lapse of 30 years from the date the will went into effect, are not sufficient grounds upon which to base a legal inference that the title of the property was vested in the testator when he made the will." (Reeves v. Low, 8 App. C., 105.)

"It was held that as the alleged will was conditioned upon the happening of an event which never took place, namely, the failure of the testatrix to return from her then projected journey, the paper never went into effect as a will. (Eaton v. Brown *et al.*, 30 W. L. R., 746; decided November 4, 1902.)

While the above quoted authorities seem to establish that there is a limitation upon the power to devise, it might be questioned, in view of the following decision, whether the Orphans' Court is the proper tribunal to raise and decide the matter of the operativeness of a will.

"Under the Married Woman's Act of this District a wife is capacitated to make a will without the consent of her husband; what the will is to operate upon is another question, and one which the Orphans' Court has no jurisdiction to pass upon; its power extends only to inquire into matters which relate to the probate, such as testamentary capacity, fraud, undue influence, and the due execution of the instrument.

> When the probate is granted, and not before the authority to determine what passes under the vill is devolved upon the courts of law and equity." Emmons v. Garnett' 1888; 18 D. C., 52.

This decision is, however, to be read in the light of the jurisdiction of the Orphans' Court, as it *then* existed (Campbell v. Porter, 162 U. S., 478); but since the Act of June 8, 1898 (now incorporated into the Code) expressly gives to the Orphans' Court plenary jurisdiction to hear and determine *all* question relating to the execution and to the *validity* of any and all wills devising any real estate within the District of Columbia," (Sec. 117 Code) it is submitted that the Orphans' Court now is the proper place, and the application for the probate of such will, the proper time to hear and determine a question relating to the devisable interest of the testator in the property in question, and hence the "validity" or invalidity of the will offered. This should especially be true where the question is: Does the will operate at all?

By the authority of section 14 of rule 8 of this Court, the original deed and will have been sent up to this Court by the Orphans' Court.

(1c) A will cannot be said to have "validity" which secretly attempts to evade the Statutes of the District of Columbia, which refer to devises for charitable uses:

> "That every gift, sale or devise of lands, to any minister, public teacher or preacher of the gospel, as such, or to any religious sect, order or denomination, or to or for the support, use or benefit of, or in the trust for any minister, public teacher or preacher of the gospel, as such, or

any religious sect or denomination and every gift or sale of goods or chattels to go in succession, or to take place after the death of sellor or donor, or to or for such support, use or benefit, and also every devise of goods or chattels to or or for the support, use or benefit of any minister, public teacher or preacher of the gospel, as such, or any religious sect, order or denomination without the leave of the legislature, shall be void, except always any church, meeting or other house of worship and for a burying ground, which shall be improved, enjoyed or used only for such purpose—or such sale, gift, lease or devise shall be void." (Section 34 of the Declaration of Rights of Maryland, August 14, 1776.)

"The thirty-fourth section of the Declaration of Rights of the State of Maryland, adopted seventeen hundred and seventy-six. so far as the same was recognized and adopted in the District prior to July twenty-fifth, eighteen hundred and sixty-six, is repealed and annulled, and all sales, gifts and devises prohibited by said section, or by any law passed in accordance therewith are, when made, valid and effectual: Provided, That in case of gifts and devises, the same shall be made at least one calendar month before the death of the donor or testator." Section 457, R. S. D. C., re-enacted by Section 1635, Code D.C., and here in passing we remark that, as it appears in Record, p. 5, a motion was made and overruled asking the addition of an issue presenting the question of the validity of the will. This judicial order being made in the Orphans' Court, an exceptiou thereto is not necessary in order to enable this court to review the accuracy or want thereof of said order.

(See Kenaday v. Smith, 179 U. S., 606.)

16752



(1*d*) When the alleged will offered for probate is silent as to any charitable disposition to be made of the whole or a part of the decedent's property, and one of the attesting witnesses thereto deposes that such direction was given, it may well be doubted whether the paper-writing offered contains all of the last will and testament of decedent.

> "Where by the common laws of this realm, lands, tenements, and hereditaments be not devisable by testament * * * yet, nevertheless, divers and sundry imaginations, subtile inventions and practices have been used, whereby the hereditaments of this realm have been conveyed from one to the other by fraudulent feoffments, fines, recoveries and other assurances craftily made to secret uses, intents and trusts, and also by wills and testaments, sometimes made by nude parolx and words, sometimes by signs and tokens and sometimes by writing, and for the most part made by such persons as be visited with sickness, in their extreme agonies and pains, or at such time as they have scantly had any good memory or remembrance, at which times they being provoked by greedy and covetous persons lying in wait about them, do many times dispose indiscreetly and unadvisedly their lands and inheritances, by reason whereof and by occasion of which fraudulent feoffments, fines, recoveries and other like assurances to uses, confidences and trusts, divers and many *heirs have been unjustly* at sundry times *disherited.*" *Statute* 27, *Henry VIII, Cap.* 10. (*A. D.* 1535.)

(1*e*) It will be observed (Rec. p. 10) that Caveators were made plaintiffs, and that upon the close of their testimony in chief a motion was made by Caveatees to withdraw the case from the jury and to

direct a verdict (Rec. pp. 24-25), which said motion prevailed. Also that Caveators read only so much of the deposition of one Hugh T. Stevenson, adduced as a witness by the Caveatees, as tended to show that on the day of the decedent's death a deed was prepared by witness conveying the same real estate mentioned in the will from decendent to the same Lucus mentioned as beneficiary in the will. (Rec. p. 21.) Stephenson was one of the attesting witnesses to the alleged will. There was no other testimony whatever on the subject of the execution of the will- Section 4 of the act of June 8, 1898 (now section 135 of Code), directs :

> "Provided, that in no case shall any will or testament be admitted to probate and record *save* upon formal proof of its execution."

In the case at bar the will was admitted to probate (Rec. p. 12–13) without such proof.

Proof of the formal execution of the will offered for probate and record cannot under the act of June 8, 1898 (see also D. C. Code, Sec. 135), be dispensed with by the admission of parties filing a caveat thereto or the consent of all concerned. (Trust Co. v. Heiberger, 30 W. L, R., 309.)

(1*f*) The trial court had no jurisdiction to try the issues, in absence of due publication as prescribed by section 6 of the Act of June 8, 1898 (now section 140 of the Code), which directs :

> "That whenever any caveat shall be filed issues shall be framed under the direction of the Court for trial by jury. If as to any party in interest, the notification shall be returned "not to be found," the Court shall assign a new day

16733



> for such trial, and shall order publication at least twice a week for a period of not less than four weeks of a copy of the issues and notification of trial in some newspaper of general circulation in the District of Columbia, and may order such other publication as the case may require."

The notification having been returned "Not to be found," as to eleven of the heirs of decedent (two of whom however appeared before the notification and filed a caveat to the alleged will and now join in the prosecution of this writ of error, to wit: Cyrus P. Reed and Gustavus L. Reed) (Rec. p. 7) the court directed publication in the manner prescribed by section 6 above quoted. The proof of publication (Rec. p. 9) shows that publication was made on the 26th and 30th days of January, 1900, and on the 2d, 6th, 9th, 13th, 16th and 20th days of February, 1900. The 26th day of January, 1900, was a Friday, and the 20th day of February, 1900, was a Tuesday, and there was no other publication during those respective weeks.

> "A week is a definite period of time commencing on Sunday and ending on Saturday." (Ronkendorff v. Taylor's Lessee, 1830; 4 Pet., 349, 361.)

That statutes prescribing the manner of publication as a substitute for personal service of process, are construed with the greatest strictness is evidenced by the subjoined citations:

> "By the general law of the land no Court is authorized to render a judgment or decree against anyone, or his estate; until after due notice by service of process to appear and de-

fend." Hollingsworth v. Barbour, 1830; 4 Pet., 466, 472.

"Publication againt absent defendants must begin and be continued, as long before the appearance day as the law requires, otherwise they will be nugatory." Thurston v. Masterson; 1836; 4 Dana, Ky., 126.

"Where service is attempted in a mode different from the course of the common law, the statute must be strictly pursued to give jurisdiction." (Jordan v. Giblin, 1859; 12 Cal., 100.)

"Where an order of publication of the summons is made for six weeks once in each week, the service is not complete until the expiration of the six weeks, or forty-two days, although the publication be made six times in as many successive weeks short of that period." (Richardson v. Bates, 1861; 23 How. Pr. Rep. N. Y., 516.)

"Where the statute requires that notice shall be published in a newspaper for four weeks, it is not sufficient to publish such notice for twenty days." (Crary v. Barber, 1869; 1 Colorado, 172, 174.)

"Under the twenty-fourth section of the Statute of New York, in regard to limited partnerships (R. S., 767), requiring notice of dissolution, previous to the time specified in the certificate of its formation, to be published once in each week, for four weeks, the day of the week which is taken for the first publication must be taken for each of the subsequent publications." 1872; King bankrupt, 5 Benedict's Dist. Ct. Rep., U. S., 453.

"Held that the Court, by such service, ac-

16732



quired no jurisdiction over the person of A, and its judgment was void." Settlemier v. Sullivan, 1878; 97 U. S., 444.)

"The words, 'at least once a week for four successive weeks' require, in effect, that there should be four publications not more than seven days apart from each other." Hernandez v. His Creditors, 1881; 57 Cal., 333.

"Held that the publication was insufficient, and that the board did not acquire jurisdiction, there being two intervals of more than seven consecutive days in the publication." Williams v. Board, 58 Cal., 237.

Under section 2 of the Act of March 9th, 1875, p. 97, notice of the pendency of a petition to establish a ditch must be published for four consecutive weeks, and notice published for one day less than that time is irregular and voidable." (Muncey v. West, 1881; 74 Ind., 409.)

"Where, therefore, after the granting of an order of publication, summons was served on defendant out of the State, November 25, 1881, and judgment by default was entered January 20, 1882, held, that the judgment was premature; and that an order setting it aside was properly granted." (Bank v. Bank, 1882; 89 N. Y., 397.)

"A statutory foreclosure sale must not be made for twelve full weeks after the first pulication of notice thereof; twelve weekly publications before sale do not of themselves make the sale valid." (Bacon v. Kennedy; 1885; 56 Mich., 329.)

"To effect service by publication the citation must be published, and should be made for full twenty-eight days once in each week for four

weeks." (Davis v. Robinson, 1888; 70 Tex., 394.)

"Service of a citation issued out of a surrogate's court when made by publication, is not complete until the expiration of at the least six full weeks from the time of the first publication." (Est. of Koch., 1890; 19 N. Y., Civ. Pr., 165.)

"A provision in a statute authorizing notice to be given to an absent defendant to appear, by publishing the same in a newspaper once a week for four months, is not satisfied by a publication once a week for four lunar months, but the word "month" when so used signifies a calendar month. To support a decree for foreclosure against an absent defendant brought in by publication for the full period required is necessary." (Trust Co. v. R. R. Co., 1891; 139 U. S., 137, 145.)

"Where the land of a non-resident is sold under decree of the United States Circuit Court, the sale is void if it does not appear from the record that publication of the warning order was made for the length of time required by the Federal Statute." Trust Co. v. Res. Co., 1893; 94 Ky., 271.

"It was error to render judgment against a defendant who was cited by publication, and who appeared only by attorney appointed by the Court, where the citation was not published once a week for four consecutive weeks as required by Rev. St., Art. 1235." Blackman v. Harry, 1896; 35 S. W. Rep., 290.

The heirs of decedent, who were not before the Court, unless this Court reverses the judgment complained of, are yet bound by the judgment, under the subjoined decisions.

"Where, however, issues have once been transmitted, and there has been a verdict upon them which has been certified to the Orphans' Court, such verdict unless vacated by some proper proceeding, is binding upon that Court and upon all the world; and it is the duty of the Court to enter judgment thereon in accordance with the verdict. Such verdict and judgment then become conclusive of the issues, and the Orphans' Court cannot thereafter direct any further or other litigation of the same issues at the instance of anyone. * * *

"Different issues affecting the validity of the will on different grounds may be successively sent to the same or a different jury for trial, on behalf of the same or other caveators. But there is no warrant in law or in reason for a second trial of issues that have been legally determined by a jury. The theory of *res adjudicata* is against such a course." (Dugan v. Northcutt, 7 App. C., 351.)

Held * * * That the parties who had not not appeared and were not before the Court in the previous proceedings were nevertheless bound thereby, since issues once properly tried cannot be retrled at the instance of another party." (Est. of Francis S. Obold, 30 W. L. R., 345.)

(1*g*) A will cannot be said to have "validity" within the meaning of the Act of June 8, 1898 (Section 117 of Code) unless all legal conditions prescribed concur in the instrument offered, and it is not entitled to probate unless "valid."

"Held that the state of the evidence leaves it in doubt whether the *animus testandi* manifested at one tims by the deceased continued with her to the time of her decease, or during her testamentary capacity, after the preparation

of the paper, and that the Orphans' Court was in error in admitting the proposed will to probate." Morsell v. Ogden, 1865; 24 Md., 377, 382.)

"When the paper creates a common fund of real and personal estate, or where the disposition of real and personal estate is so blended that the intention of the deceased, in respect to the one estate, is made dependent upon the other, in such cases, if the instrument cannot operate as to both estates by reason of defective execution, the courts are stronly inclined to reject the paper *in toto*, and nothing short of the strongest proof of design on the part of the deceased will induce the courts to admit the instrument to proof as to the personal estate alone." (Devecmon v. Devecmon, 1875; 43 Md., 335, 345.)

"The question of the competency of a testator to make a will involves the inquiry whether he was of sufficient mental soundness to change any previously existing purpose he may have formed if he should think proper to do so. The mere fact that a will is in the direction of a preconceived purpose should have no weight unless the testator was of sound and disposing mind at the time of executing the paper." Est. of Hoover, 19 D. C.; 495.)

"The test of testamentary capacity is whether, at the time of making the will, the testator was capable of making a valid deed or contract. (Md. Act. 1798, Ch. 101.) The incapacity alleged must exist at that time of making the will. Undue influence, to avoid a will must destroy free agency, But any degree of importunity or undue influence which deprives him of his free agency, and which is such as he is too weak to resist, and in effect renders the instru-

ment not his free and unconstrained act will invalidate the will." (Barbour v. Moore, 4 App.; C. 535.)

(1*h*) The secret devise to the church of which Stevenson, the attesting witness, was pastor, is void under the statutes in force in the District of Columbia, and the entire will is void *pro tanto* for that reason alone.

"One of the subscribers to the attestation of a will had an interest under it and held not to be a credible witness within the statute," (Holdfast v. Dowling, 1746; 2 Strange's Rep., 1253.)

"An estate in fee, upon the determination of a life estate was devised to the wife of A. B. A. B. was one of the attesting witnesses to the will. The testator died in 1779, and the wife of A. B. died in 1813 before the previous life estate was determined: Held, that A. B. was not a good attesting witness to this will" (Hatfield v. Thorp, 1822; 5 Barnewell & Ald. Rep., 589.)

"The statute of 25 George II, chapter 6, section 1, rendering null and void any bequest or devise of any real estate or beneficial interest thereia to a witness attesting the execution of the will, is in force in this District." (Elliott v. Brent, 1887; 6 Mackey, 17 D. C., 98.)

"Be it enacted by the King's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that if any person shall attest the execution of any will or codicil which shall be made after the twenty-fourth day of June, in the year of our Lord one thousand seven hundred and fifty two, to whom any ben-

eficial devise, legacy, estate, interest, gift or appointment of or affecting any real or personal estate, other than and except charges on lands, tenements or hereditaments for payment of any debt or debts, shall be thereby given or made, such devise, legacy, estate, interest, gift or appointment, shall, so far only as concerning such person attesting the execution of such will or codicil, or any person claiming under him, be utterly null and void; and such person shall be admitted as a witness to the execution of such will or codicil, within the intent of the said Act; notwithstanding such devise, legacy, estate, interest, gift or appointment mentioned in such will or codicil." Act 25 George II, Cap. 6 Sec. 1., see note in 3 Jarman on Wills (edition of Randolph snd Talcott), p. 776.

(2.) The trial court erred in holding the evidence adduced by caveators insufficient to entitle them to go to the jury. This evidence is set forth in the bill of exceptions. (Rec. 14-25):

> "In its opinion this court reviews the evidence offered by the plaintiff on the trial of the case in the court below; none being offered there by the defendants, and finds it sufficient to entitle the plaintiff to have the issue submitted to the jury; and as the court below directed the jury to find a verdict for the defendants, which was done, and a judgment was entered on the verdict, this court reverses the judgment and remands the cause, with directions to grant a new trial." Humiston v. Wood, (1887) 124 U. S., 12.

(2*a*) The testimony of seven doctors, men of the highest standing in the profession, produced by the caveators, substantially coincided on an issue of capacity that the decedent had no testamentary

capacity; at any rate, the testimony was sufficient for the consideration of the jury.

> "Where there is testimony in a cause conducing to prove that a will was a direct consequence of a delusion under which the testator labored; a delusion calculated to pervert his judgment with respect to the disposition of his estate, it is perfectly clear, that he could not be considered as possessing a testamentary capacity, although, upon other subjects, he may have been rational and sane." Delafield v. Parish, 25 N. Y., 54.

(2*b*) The total disherison of the heirs at law, without naming them, tended to show incapacity. (Statute 27 Henry VIII, Cap. 10. Brief p. 31.)

> "By the law of Pennsylvania, heirs must take, unless they are disinherited by express words or necessary implication." Allen v. Allen, (1855) 18 How., 385,392.

> "The mere intention to disinherit the heir cannot affect him, for he takes under the law and not under the will, and may claim contrary to the express intention of the testator." Philleo v. Holiday, (1859) 24 Tex., 38,42.

> "An explicit declaration in a will that the heir shall not inherit, is wholly ineffectual to defeat his right, unless there be a *valid* devise to some one else." Zimmerman v. Hafer, 81 Md., 347.

> "A verdict that testatrix was of unsound mind when she made a will disinheriting an only child, who was in straitened circumstances, will not be disturbed, where the evidence shows that after her husband's death she lived for the greater part of her life by herself, occasionally stay-

ing with friends, and at different times naming different persons, strangers and relatives, including her son, to whom she proposed to leave her property, and finally a few hours before death, while in a very exhausted condition, she made her will in favor of her nephew whose father had persistently and for a long time pressed her to do so." Gurley v. Park, 35 N. E., 279.

"A will disinheriting a daughter will be set aside where it appears that the will was made by the father under the influence of a specfic delusion, based upon no facts whatsoever." (Thomas v. Carter, 1895; 170 Pa., St., 272.)

"A will cannot be sustained which is the direct result of an insane delusion of the testator in regard to the person who is the object of his bounty, or in regard to his moral duty to make the will in favor of a particular individual, corporation or society." (Orchardson v. Cofield, 1897; 171, Ill., 14.)

"The heir at law takes the benefit not only of a general and total but of a particular and partial failure of disposition under the will." (Schouler on Wills, 2nd Ed., 545.

"Directions excluding the heir at law or next of kin from any share in the testator's property will, as a general rule, be taken to have been inserted only for the purpose of the dispositions made by the will, and will not exclude the heir at law or next of kin from taking *property undisposed of*." (Theobald on Wills, 2nd Ed., 610.)

(2*g*) The confidential relations subsisting between the devisor and devisee casts the burden of proof upon the latter to sustain the devise.

"Where a person makes a will in favor of his priest, or religious adviser, to the exclusion of the natural objects of the testator's bounty, the law presumes undue influence, and to sustain the will there should be some proof besides the making of it." Marx v. McGlynn, 1882: 88 N. Y., 357, 371.

"When a will offered for probate is in the handwriting of the person to be benefited by it, before the will can be admitted to probate, it must be satisfactorily established, that the testator knew its contents. If, in addition to the will being written by the beneficiary, other suspicious circumstances exist, such as extreme debility of the testator, and great confidence reposed by him in the writer, the demand of the law for proof of knowledge of the contents of the will, will be increased." Daniel v. Hill, 1875; 52 Ala., 431, 437.)

"Where the testimony disclosed a very weak testatrix, and a will written by a person in confidential relations, under which he takes the whole estate, it becomes essential for the proponent to show affirmatively that testatrix had full knowledge and consciousness of what she was doing. Smith's Est., 1893; 3 Pa. Dist. Rep., 247,

"Undue influence is such influence as causes the subject to act against his own preference or desire. The relation of clergyman and parishioner, as the books term it or perhaps more properly, of spiritual adviser and the subject of his ministrations, is of a confidential nature, and raises a presumption of undue influence on the part of the former in case of a contract between them. Or, stating it differently, where such spiritual adviser obtains a devise or grant or gift from a member of his flock, the burden

is upon him to show the entire good faith of the transaction." (Good *et al.* v. Zook *et al.*, 1901: 88 N. W. Rep., 376.)

"When, at the time of a given transaction, a fiduciary or confidential relation is shown to have existed between the parties, and the opportunity for the exercise of undue influence was present in the relations and circumstances of the parties, and the one in the superior position of being able to exercise the influence has actually procured a benefit to himself from the other, a court of equity will not allow the benefit to stand without clear and satisfactory proof of the entire fairness of the transaction. Held in the present case the grantee in the deed has failed to show that the transaction with his mother-in-law, to whom he stood in a confidential relation, by which he was benefited, was fair and just; and the deed ordered to be vacated. In a suit to annul a deed on the ground that the grantor was not mentally capable of making a valid deed or contract, held that the case was one in which the verdict of a jury on issues properly formulated and sent to a court of common law for trial, might well be taken for the information and guidance of a court of equity, and a decree dismissing the bill reversed, and the cause remanded that such proceedings might be had." Moran v. Sullivan et al, 12 App. C., 137.

"Held, upon a review of the evidence, that the testimony of the defendant was unworthy of credence, and that a decree vacating the deed to him, and also a deed of trust executed by him to secure a loan, must be affirmed." Slater v. Hamacher, 15 App. C., 558.

"There are a number of authorities which, when confidential relations are shown, apply the equitable doctrine of constructive fraud and

devolve the burden of proof upon those claiming under the will." Onus Probandi and Preparation for trial. Bailey, p. 403.

(2*d*) The last important point, suggested by the record, is whether the act of signing a deed and will successively, both affecting the same property, does not *itself* indicate absence of testamentary capacity. By quoting from the deposition of Stevenson (Rec. p. 21-24.) the caveators did not intend to accredit him as their witness as to the conversation said to have transpired between Leach and Stevenson. But caveators had no other way to get before the court the *fact* that a deed and a will were successively signed on the same day, touching the same property, and between the same parties. Caveators believe this alleged conversation, if it occurred, emanated from Stevenson, and not from Leach. That Stevenson only resorted to the expedient of making the will to supply the deficiencies of the deed, as he himself says (Rec. p. 22); without knowing the legal effect of the papers. In respect to this matter, what the court below says: (Rec. p. 37.)

"Moreover, if the deed in question was valid to convey the testator's property to the grantee named in it, it is not apparent how the appellants can be prejudiced by the admission of the will to probate. For, since the grantee in the deed and donee under the will are one and the same person, if the grantee has already good title under the deed, as against the appellants, certainly the appellants cannot be injured by such confirmation, if any, as the will may give to the previous grant. The fact that, by the Act of Congress, the adjudication on the will in the present proceeding is made a finality as to the validity of the will, cannot have the effect

of substituting that will for the prior deed if that prior deed was a valid operative instrument; and if it was not a valid operative instrument, of course, the contention of the appellants wholly fails."

—ignores entirely, the consideration that there may be an injury to the *law*, by violation of the Act of Congress; independently of the injury the plaintiffs in error might have suffered or even if they suffered none at all. The Act of Congress gives the orphans' court judicial power to admit to probate *testamentary instruments*. The orphans' court does not, like a recorder of deeds, have to admit to record anything that satisfies the forms of law. If the court below is right, a number of courts, that have passed on similar questions, as appears by subjoined extracts, are radically and fundamentally wrong. It is eminently appropriate therefore that the court of last resort should speak finally and authoritatively on the subject. Moreover the view in this regard presented in the decision of the court below is fallacious, and unjust to the caveators, because they do not know and cannot know, (until the deed is offered as a source of title which has not been done, as yet) "*whether the grantee has already a good title under the deed*, as against the appellants." This is to be assumed only for the purposes of this case; and upon inspection of the deed itself, which is unrecorded and held in the custody of the defendants in error. Plaintiffs in error do not doubt that if the alleged will should finally be denied probate, the defendants in error would then seek to assert title under the deed.

If the deed in question here is good as between the

parties thereto, under 1 Devlin on Deeds 599 (*infra*) though not good as to third persons, yet it should be held that the grantor so altered the seisin of the property as to make the alleged will inoperative.

> "The rule which obtains in most of the states is that as between the parties, no acknowledgement is necessary. The provisions relating to the acknowledgement of deeds are made for the protection and security of creditors and purchasers. But so far as the grantor is concerned, the title vested in him passes by the deed to the grantee as completely as it would if the conveyance had been acknowledged and recorded. The want of the acknowledgement, or the proof which may authorize admission of the deed to record, does not invalidate the deed as between the grantor and grantee ; and it is good as to all persons who are charged with such notice. The ackowledgement and recording of the deed are provisions which the law makes for the security of creditors and purchasers. They are not essential to the validity of the deed as to the grantor. An unacknowledged deed passes title equally with one duly acknowledged and certified Acknowledgement has reference simply to the proof of execution, not to the force of the instrument." 1 Devlin on Deeds, (2nd ed.) §465 p., 599.

It is submitted that the authorities pertinent under this head are divisible into six classes :

The first class is : where the same instrument is capable of construction either as a deed or a will ; as illustrated by—

> "Whether a paper be a will or a deed depends upon its effect and operation, to be determined by its own terms." (Daniel v. Veal, 1861 ; 32 Ga., 589, 591.

The second class is: where the same instrument is capable of construction, either as a deed or a will; the law will presume it a deed if the transaction is *inter vivos*, taking effect *in praesenti;* if it does not take effect until after the death of the testator, it will be deemed a will; as illustrated by—

> "The circumstances in evidence respecting the deed make it probable that he thought he was executing the deed. These circumstances taken in connection with the advanced age and the then situation of the deceased, and his death shortly after, are conclusive to show that the instrument exhibited ought not to be established as his will." (Swett v. Boardman, 1804; 1 Mass., 257, 262.)

At any rate, a doubt as to the delivery of a paper is to be resolved by a jury; as illustrated:

> "It is proper to submit to a jury whether a deed had been delivered as the deed of the party." (Wadsworth v. Warren, 12 Wall., 307.)

The third class is: where the deed is executed after the will, giving a total or partial revocatory effect; as is illustrated by—

> "A convey ance of property previously devised works a revocation of such devise, *and this, where the conveyance is to the devisee.*" (Coulson v. Holmes, 1878; 5 Sawyer, 279.)

> "By his will executed in 1872, testator devised his real estate equally to his wife and his three children in fee. Having been annoyed, with law suits by his son-in-law he executed a deed in 1887, conveying his real estate to a trustee in fee for the sole benefit of his wife.

16741



Held, the deed was a revocation of the will. The deed having been delivered in the grantor's lifetime was valid, though not recorded until after his death. As between the beneficiaries under the will, *the will was inoperative as to such property as was parted with during the life of the testator.*" Collup v. Smith, 1892; 89 Va., 258, 264,

The fourth class is: where the deed is executed before the will, making the latter inoperative as illustrated by—

"The Court concurs with the presiding chancellor that the will of Edward Blake could not not control the dispositions of the *deed previously executed.* (Purcell v. Purcell, Riley Eq. Rep., S. C., 282, 284.)

"If the deed had been sustained Zimmerman would have held under it, and not under the will. *Clearly he could not have held the same estate under both the deed and the will at the same time.* If the deed had prevailed he then have held under it, and it only, because it would then have conveyed the grantor's entire interest to the grantee, being ostensibly a deed in fee simple. If it effectually conveyed a fee then it would have divested the grantor's whole interest in the property, and having been executed prior to the will there would have been *no estate left in the grantor for the will to operate upon.*" (Zimmerman v. Hafer, 1895; 23 W. *L.* R., 767, 568; 81 Md., 347.)

The fifth class: where the instrument is imperfect and inoperative either as a deed or a will; in such cases the courts prefer intestacy, rather than that the law be strained or violated; as illustrated by.

"An instrument may fail of effect as a testamentary paper, and also be ineffectual as a transaction *inter vivos*." Cover v. Stem, (1887) 67 Md., 449.

The sixth class: where doubt exists as to the order of execution, as illustrated by citation.

"Two inconsistent papers being signed the same day, the court might receive evidence which should operate." Est. of Nosworthy, (1865) 11 The Jurist, (pt. 1 N. S.,) 570.

It is submitted that the case at bar is clearly comprehended within the fourth class, and that the decisions cited thereunder are on cases exactly parallel to that at bar and directly antagonistic to the reasoning employed in the opinion of the court below, in the quotation therefrom (Brief p. 45.) The decision in 89 Va., 264, cited under the third class, though on a converse state of facts, is based on the same reasoning employed in Riley Eq. R., (S. C.) 289 and 87 Md., 347, cited under the fourth class. So three different state courts agree upon an opposite conclusion from that arrived at by the court below, on substantially the same state of facts, But the court below lays stress upon the identity of the grantee in the deed with the donee in the will. But in the cases in 81 Md., 347 and 5th Sawyer, 279 (supra,) this identity of personage was held not to affect the legal aspect of the question whether title was divested from the settlor by the deed or by the will.

It must therefore have been manifest to the decedent, if he had testamentary capacity at the time of the execution of the will, that he was donating by the will what *he had already granted* by the deed.

16742



In that same predicament, Isaac on his death-bed *remembered* that he could not give to Esau what he *had already given* to Jacob, when he said: "Thy brother came with subtilty, and *hath taken away thy blessing*." Genesis 27, verse 35.

So if decedent was possessed of sound memory at that time he would not have attempted to make a will *after* a deed, both affecting the same property. The fact that he did so was a *prima facie* argument against his capacity to make the alleged will; and that one circumstance alone, unaided by the others in the record, was sufficient, as plaintiffs in error submit, to entitle them to go to the jury on the issue of testamentary capacity, and made it reversable error in the trial court to direct a verdict. (Humiston v. Wood, 124 U. S., 12 Supra.)

J. H. ADRIAANS.